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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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Sup Ct

No. 312

**HARRY R. SWANSON, AS SECRETARY OF STATE OF
NEBRASKA, ET AL,**

Appellants,

vs.

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA.**

STATEMENT AS TO JURISDICTION.

**WALTER R. JOHNSON,
Attorney General of Nebraska,**

**JOHN RUSSELL,
Assistant to the Attorney General,**

**WILLIAM J. HOTE,
Special Assistant to the
Attorney General,**

Counsel for Appellants.

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HARRY R. SWANSON, AS SECRETARY OF STATE OF

NEBRASKA, ET AL.,

Appellants,

vs.

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISH-
ERS, ET AL.,**

Appellees.

**ATTACHED HERETO AND MADE A PART HEREOF,
IN ACCORDANCE WITH RULE No. 12 OF THE
SUPREME COURT OF THE UNITED STATES ARE
THE FOLLOWING APPEAL PAPERS:**

(a) Memorandum Opinion overruling motion to dismiss and granting temporary injunction, dated November 13, 1937, and injunctional order of November 13, 1937.

(b) Opinion on merits and permanent injunction, dated December 28, 1939.

(c) Findings of fact, conclusions of law, and decree dated January 25, 1940.

(d) Motion for new trial or to correct decree, dated February 5, 1940.

(e) Order overruling motion for new trial or to correct decree, dated March 28, 1940.

(f) Nebraska Legislative Act, Session Laws, 1937, Chap. 138, page 488 (Buck v. Swanson, 33 Fed. Supp. 377).

This action in equity was filed by the plaintiffs and appellees in the United States District Court, for the District of Nebraska, Lincoln Division, on June 8, 1937, seeking to enjoin the enforcement of a Nebraska legislative anti-monopoly act, which became effective May 17, 1937. These plaintiffs below were the American Society of Composers, Authors and Publishers, called ASCAP, organized under the laws of the State of New York. This organization is officered by a board of directors, and all its members are composers of copyrighted musical compositions and publishers of such copyrighted musical compositions. Among the plaintiffs below also were some publisher members from New York and some composer members from New York and Maine. The defendants were all law enforcement officers of the State of Nebraska.

No action was taken in the State courts of Nebraska by either party, and no construction was placed on the particular statute in question by any court of this State.

Appended to the bill of complaint filed were all the typical contracts which ASCAP had entered into with the other plaintiffs and all the other members of the society, both composer members and publisher members; and all typical contracts with all of the users of the ASCAP music in Nebraska; and also ASCAP articles of association, together with a copy of the Act.

ASCAP deals exclusively in what is known as the "small rights" for profit of public performance of music played

or sung in public. The Copyright Act [Title 17, U. S. C. A., Sec. 1, (e)] grants to the copyright owner the right to receive pay for such public performances.

The petition and exhibits made a part admitted that it had assigned to it from each member the exclusive power to fix prices, control terms, and collect the money for these public performance licenses everywhere, including the State of Nebraska, and distribute it as dividends to the members.

Interlocutory injunction was granted on November 13, 1937, in favor of the appellees and plaintiffs below; likewise a motion to dismiss, filed by the appellants and defendants below, was overruled on the 13th day of November, 1937. Exceptions were filed thereto on the 18th day of November, 1937. The memorandum opinion, rendered on November 13, 1937, is attached to this statement.

No appeal was prosecuted from either of these orders; and, except for an assignment of error based upon the Court's error in overruling the motion to dismiss based upon the petition and exhibits attached to it, none of said matters are before this Court on this appeal.

The court that heard the foregoing matters, and all subsequent matters, was a three-judge Federal court consisting of United States Circuit Judge, Hon. Archibald K. Gardner, and two United States District Judges, Hon. Thomas C. Munger and Hon. James A. Donohoe (Sec. 266 of the Judicial Code; Sec. 380, Title 28, U. S. C. A.).

The appellees stated as the basis for their action that the entire Nebraska statute deprived all the plaintiffs of the rights granted to them under the Copyright Act and was in violation of Article I, Sections 8, 9, and 10; Art. III, Section 2; Article IV, Section 2; and Article VI, Section 2 of the Constitution of the United States; and the Fourteenth Amendment to the Constitution of the United States; and

Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25 of the Constitution of the State of Nebraska.

The answer was filed on the 18th day of November, 1937. In that answer, the appellants denied that the Nebraska Act was in violation of said provisions, or any of them, but instead was a proper exercise of the Nebraska legislative authority under the police power of the State declaring as unlawful any association of a substantial number of composers and publishers who combine for the purpose of fixing prices for public performance, if in restraint of trade, and providing the usual, ordinary penalties for violations thereof similar to the other anti-monopoly statutes of the State (Chap. 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets; Art. 10, Dairy Industry; 1937 Supp., Art. 11, Protection of Trade Marks, Brands and Names).

Much evidence, oral and documentary, was taken at the trial on September 18th to 21st, 1939, and many depositions and interrogatories were there introduced. A bill of exceptions or transcript of the oral testimony was taken and transcribed by the official court reporter and was submitted and filed with the court shortly after the hearing.

On December 28, 1939, the three-judge court entered its opinion, a copy of which is hereto attached, wherein it held that because Section 2 (B) of the Nebraska Act was a violation of the National Copyright Act therefore the whole act must fail because that subsection was inseparable from the balance of the act and was the inducing cause for its passage. The opinion ordered the plaintiffs and appel-

lees to prepare findings of fact, conclusions of law, and decree in accordance with that opinion.

The findings of fact, conclusions of law, and decree were signed and filed by the three-judge Federal court on the 25th day of January, 1940. The findings of fact made no reference to Section 2 (B) as the inducing cause and inseparable from the balance of the act, as found in the opinion, but declared the entire act non-enforceable without stating that the act was in violation of any Federal or State Constitution or the National Copyright Act, as did the opinion confined to Section 2 (B) of the Act.

The opinion and findings, however, did find extensive, definite facts in connection with the activities of ASCAP, and did find that it was a monopolistic combination; that it did fix and control prices, and controlled substantially all the commercially usable public performance rights of copyrighted vocal and instrumental musical compositions used in Nebraska; and that said ASCAP was operating through its authorized agents and representatives within the State of Nebraska, and thus carried on its activities therein; that the composer plaintiffs and appellees and publishers were acting in the State of Nebraska only by virtue of their membership in the ASCAP association, but had no direct dealings of any kind in the State, they having assigned their exclusive rights in public performance for profit to ASCAP.

On the 5th day of February, 1940, the defendants and appellants filed a motion for new trial or to correct the said opinion, findings, conclusions, and decree in the matters specifically referred to in the motion.

These papers: Opinion, findings of fact, conclusions of law, and decree, as well as motion for new trial or to correct decree are attached hereto and made a part of this statement.

On the 25th day of March, 1940, a rehearing was granted by the said three-judge Federal court; and on March 28, 1940, the said motion to correct the decree or to grant a new trial was overruled. A copy of that order so dated is attached to this statement and made a part hereof.

On this date, June 27, 1940, there was presented to the Hon. Thomas C. Munger, Judge of the United States District Court, one of the three Federal judges, a Petition for Appeal, together with Prayer for Reversal and Dismissal, Assignment of Errors and Brief, Cost Bond, and Citation. On this same day, June 27, 1940, an order allowing that appeal was duly signed by that Judge (Rule 36 of U. S. Supreme Court). All said papers were on this day, June 27, 1940, filed with the Clerk of the United States District Court at Lincoln, Nebraska.

THEREFORE, the basis for the jurisdiction of the Supreme Court of the United States to entertain this appeal is based upon Section 238 (3) of the Judicial Code, which is Section 345, Title 28, U. S. C. A., which provides for a direct appeal to the Supreme Court of the United States when a State statute has been brought in issue in the Federal court and its enforcement permanently enjoined, as was done in this case. Also Section 266 of the Judicial Code (Section 380, Title 28, U. S. C. A.) provides for direct appeal to the Supreme Court of the United States from an order granting a permanent injunction.

The court fixed the return day at forty (40) days and provided in the citation for service to be made upon the plaintiffs and appellees together with all the papers required by Rules 10 and 12 of the Supreme Court, with the appellees' attention directed in the citation to Subsection 3 of Rule 12 of the Supreme Court of the United States. The return of the service of that citation will be filed within five

(5) days with the Clerk of the United States District Court and will be shown in the record on appeal.

The prayer in the petition for appeal requested that the appeal be granted, which was done on this date by order allowing the appeal, as above referred to; and also prayed that citation issue to all the plaintiffs and appellees; and that said cause upon appeal be reversed, and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs; and for such other and further relief as may be deemed just and equitable in the premises.

The appeal papers required by the rules of the court have been attached hereto chronologically.

The appellants, believing that because the statutory provisions above referred to, to-wit: Section 238 (3) (Title 28, U. S. C. A., Sec. 345) and Section 266 (Title 28, U. S. C. A., Sec. 380) of the Judicial Code provide for the jurisdiction of the Supreme Court on appeal; and it being apparent that all steps for the appeal to this point have been done within the time and in the manner provided, believe it becomes unnecessary to cite cases to sustain the United States Supreme Court's jurisdiction.

Attached to the assignment of errors is appellants' brief with law points and citation of authorities.

THEREFORE, appellants pray that the Court will assume its jurisdiction hereof and reverse and dismiss the cause as prayed in the petition for appeal.

WALTER R. JOHNSON,
Attorney General of the State of Nebraska;
JOHN RIDDELL,
Assistant to the Attorney General;
WILLIAM J. HOTZ,
Special Assistant to the Attorney General.

EXHIBIT "A".**Memorandum Opinion.**

Filed Nov. 13, 1937.

No. 562 Eq.

Per CURIAM :

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the state of Nebraska. The plaintiffs have alleged that the enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code, Section 1, et seq.) and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiff.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage

of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

EXHIBIT "B".

Injunctional Order.

Filed Nov. 13, 1937.

This cause came on to be heard at this term, under Section 380, Title 28 U. S. C. A. (Jud. Code Sec. 266), and the Court sat as provided therein, and the cause was argued by counsel; thereupon, upon consideration thereof, it was Ordered and Adjudged, as follows, viz.:

1. That the motion made by the complainants for temporary injunction, be, and the same is hereby, in all respects, granted.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard C. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B.

Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be, and they are, each of them, severally, enjoined and restrained, pendente lite, and until the further order of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding, at law or in equity, for the purpose of enforcing or executing the Statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said Statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated, be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants, or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective pub-

lishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska, or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3: That the motion made by the defendants herein to dismiss the bill of complaint herein, be, and the same is hereby, in all respects denied.

4. That the defendants be given thirty days from the date hereof to answer herein.

5. The court finds that unless an injunctive order of this nature be issued, the plaintiffs would be irreparably damaged and that plaintiffs have no adequate remedy at law. This order is made conditional upon the filing herein within 30 days of an approved bond by the plaintiff, in the penal sum of Five Thousand (\$5,000) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the court may direct.

Dated Nov. 10, 1937.

ARCHIBALD K. GARDNER,
United States Circuit Judge.

Dated Nov. 13, 1937.

THOS. C. MUNGER,
United States District Judge.
J. A. DONOHUE,
United States District Judge.

Filed in Lincoln Division, Nov. 13, 1937. R. C. Hoyt,
Clerk, by J. B. Nickerson, #19, Deputy.

EXHIBIT "C".

Equity No. 562

Filed in Lincoln Division, Dec. 28, 1939, Mary A. Mullen,
Clerk, by J. B. Nickerson, Deputy.

Before Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and James A. Donohoe, District Judge, sitting pursuant to Section 266 of the Judicial Code.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck, its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treasurer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein *in haec verba*, but it will be found in the subjoined note.

(Here follows Legislative Bill No. 478 Final Form on Third Reading.)

There are approximately 1000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal

publishers of the country. Each member has assigned to the society the conclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blank licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately \$12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about \$26,000.00 to the society annually. Another group of stations paid the society about \$27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately \$70,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some \$6,000,000.00 was taken in for public performance rights by the society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and

the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

All the contentions of plaintiffs, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but the single question is the constitutional validity of the challenged statute.

It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized.

The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. *Nebbia v. New York*, 291 U. S. 502; *Waters-Pierce Oil Co. v. Texas*, 197 U. S. 115; *Dayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Paramount Pictures v. Langer*, 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A state statute, though enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforceable rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. *King Features Syndicate v. Fleischer* (C. C. A. 2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. *United States v. Dubilier Condenser Corp.*, 289 U. S. 178; *United States v. American Bell Telephone Co.*, 167 U. S. 224; *Burrow-Giles Lithograph Co. v. Serony*, 111 U. S. 53; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (C. C. A. 7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In *American Tobacco Co. v. Werckmeister*, *supra*, it is said:

“ . . . the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.”

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in *Caliga v. Inter Ocean Newspaper Co.*, *supra*,

“The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.”

The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. *Atlantic Monthly Co. v. Post Pub. Co.* (D. C. Mass.) 27 Fed. (2d) 556; *American Tobacco Co. v. Werckmeister*, *supra*.

Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (B) of the statute provides that,

"In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to

collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights, of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U. S. 613.

While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

"If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or nonenforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. *First Trust Co. v. Smith* (Neb.) 277 N. W. 762; *Laverty v. Cochran* (Neb.) 271 N. W. 354; *Hubble Bank v. Bryan* (Neb.) 245 N. W. 20. In *Laverty v. Cochran supra*, the court in speaking of a severance clause contained in a statute said:

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. *State v. Ure*, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

EXHIBIT "D".

Filed in Lincoln Division, Jan. 25, 1940. Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

Findings of Fact and Conclusions of Law.

Buck v. Swanson, 33 Fed. Supp. 377.

This suit having been duly commenced on June 8, 1937, by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon all the defendants, except the defendants John Havekost, Ray C. Johnson, Walter R. Johnson, William T. Gleason, Zelma Derry, Rush C. Clarke, "JOHN DOE" and "RICHARD ROE," (said John Havekost hav-

ing been substituted by stipulation in place and stead of Walter H. Jensen, said Ray C. Johnson having been substituted by stipulation in place and stead of William H. Price, said Walter R. Johnson having been substituted by stipulation in place and stead of Richard C. Hunter, William T. Gleason, having been substituted by stipulation in place and stead of Charles H. Hood, Zelma Derry having been substituted by stipulation in place and stead of Gerald J. McGinley) and this court having duly granted a temporary injunction on November 13, 1937, and defendants thereafter having duly filed their answer on November 18, 1937, and this cause having come on for trial on the 18th, 19th, 20th and 21st days of September, 1939, at the District Court of the United States, District of Nebraska, Lincoln Division, in the Federal Post Office Building, City of Lincoln, Nebraska, and complainants having appeared by L. J. TePoel, Esq. (Louis D. Frohlich, L. J. TePoel and Herman Finkelstein, of Counsel), and defendants having appeared by W. R. Johnson, Attorney General (William J. Hotz, John Riddell and Andrew Bennett, of Counsel), and evidence having been adduced upon the merits of this case and due deliberation having been had, and the Court having filed its opinion, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the "Statute."

2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who constitute some of the principal publishers of the country.

Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society \$68,769.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from points outside

of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all their own vocal and instrumental musical programs. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately \$12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approximately \$48,700.

The largest radio station in the State pays about \$22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about \$21,700 in 1938. The cost of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some \$6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer- and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of

them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of the Society who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

11. The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

12. The contracts between the individual composer and author members of the Society, including the individual

plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with any State Authority, copies of the respective compositions copyrighted by their respective members.

16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over

the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and broadcasting stations.

19. The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defend-

ing against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska.

22. Complainants have no adequate remedy at law and are relievable only in this court of equity.

CONCLUSIONS OF LAW.

I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute.

II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

Let decree be entered accordingly.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,
U. S. Circuit Judge;
THOS. C. MUNGER,
U. S. District Judge;
J. A. DONOHUE,
U. S. District Judge.

EXHIBIT "E".

Filed in Lincoln Division, Jan. 25, 1940. Mary A. Mullen,
Clerk, by J. B. Nickerson, Deputy.

Final Decree.

No. 562. Equity.

Buck v. Swanson, 33 Fed. Supp. 377.

This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon, the court having made its Finding of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937, be and the same is hereby made permanent and perpetual.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State

of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts-Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of \$—, and now here decreed to the complainants, and that if the same be not paid within thirty

days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court:

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge.
THOS. C. MUNGER,
United States District Judge.
J. A. DONOHUE,
United States District Judge.

EXHIBIT "F".

Equity No. 562.

Defendants' Motion for New Trial With 22 Affidavits Attached.

Filed With Return of Service in Lincoln Division, Febr. 5, 1940.

I.

The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

- (1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and
- (2) In pursuance of said Rule 59,
 - (a) Amend the Findings of Fact; and
 - (b) Make additional Findings of Fact; and
 - (c) Amend the Conclusions of Law; and
 - (d) Amend and direct the entry of a new Decree; and
- (3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39, with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40; and

(4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or

(a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and

(5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

- (a) The record as made; and
- (b) The showing accompanying this motion; and
- (c) The law applicable to the issues involved; and
- (d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

II.

Regarding Defendants' Lack of Opportunity to Object to the Final Opinion, Findings, Conclusions, and Decree.

The defendants state that the opinion of the Court of 12/28/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future

proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defendants' cause.

III.

Defendants' More Specific Statements of the Grounds Set Forth in Paragraph I Above for Setting Aside Certain Findings of Fact, and Amending Others, and Making Different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following which should be stricken:

"Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, . . ."

The question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Page 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39, appears:

"The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act.

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights. These definitions do not coincide with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accord-

ance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6, the following:

"The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Nebraska. The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same", which language is copied verbatim from the National Copyright Act, Title 17, U. S. C. A.

5. Strike from Page 7 of the opinion of 12/28/39, the following language:

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding, in reference to the National Copyright Law, which is as follows:

"As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39, is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

6. Strike from Page 7 of the opinion the following:

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of Page 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted.

7. Strike the reference to Section 2 (B) on Page 6 of the opinion of 12/28/39, and on through to the end of the opinion on Page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this

motion and attached hereto as Exhibits 1 to 22 and made a part hereof. If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features of L. B. 478, as defined in Section 1 of said Act, because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of the Act.

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold:

“The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts.”

and therefore

“the whole act must be held inoperative.”

• The contrary now appears of record by said affidavits of the legislators attached. Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows:

"Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39.

IV.

The following should be stricken from the Final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference to L. B. 478 to be printed in the footnotes. The entire Act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations", and the words "authors, composers, and publishers" stricken, so that the same shall properly read:

"Its membership consist of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following:

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows:

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk". ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

"The cost of operation of the Society is approximately 20% of the gross amount received."

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs. There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights of the defendants; or, the Court, under permissive Rules 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following:

"Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions."

Further on in the paragraph, there should be stricken:

"and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily."

and also, there should be stricken:

"and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

There was no evidence introduced on this subject of any probative force, or of evidentiary value; the same was only

casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact.

8. Paragraphs 9, 12, 13, 14, 15, 16, 17, 19, and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise "sales talk" and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.

9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all.

V.

The Conclusions of Law of the Court, filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein.

VI.

The Decree should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is non-enforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is non-enforceable. The same might be true of other sections, such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

VII.

The defendants move the court to amend its findings of fact to include the following important and material matters clearly and unmistakably in the record:

1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not; that blanket licenses only are demanded by and acceptable to ASCAP; that ASCAP refuses radio users a per-piece or per-program charge based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk; that such conduct is discriminatory and unfair to music users; that repeated demands for per-piece or per-program rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony), but ASCAP insists, and enforces through its monopolistic control, the blanket license which it demands and which is based upon percentage of gross business done

plus a sustaining fee, irrespective of the program (Radio station contracts in evidence).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP.

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringements. (See Columbia and National contracts in evidence.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theater contracts in evidence.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of ASCAP. (Malec, Hedlin testimony and contracts in evidence.)

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP to protect the same or go out of existence as music users at great inconvenience and loss. (Malec, Gillin, Hedlin, and Searle testimony.)

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin), nor does the National Hotel Association speak for the hotels (Hedlin) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state. (Blazer testimony.)

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they

have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher, and are placed in a classification in which the first group, of about 50 composers, receive as much as \$17,500 per year, and the publisher members in the first group \$150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Ceasar Deposition); and through the scheme of the publisher members taking one-half of the profits and the selected classification (By-Laws—Complaint) of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive \$50,000 a year salary and bonuses of \$5,000 to \$8,000; that \$30,000 a year rent is paid in New York for the headquarters (Buck); that ASCAP is a substantial business organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name appears on all the contracts for ASCAP.

10. That the purpose of showing that there were 284,000 (Gillin) radio sets in Nebraska and 24 hotels (contracts) and 10 radio stations, and that a third of the population at sometime during the year entertained itself in dancing; and that there are 350 dance halls (Malec) and music rooms in the State of Nebraska, is to prove the matter of the public interest in the matter of copyrighted music within the State of Nebraska; and defendants are entitled to such finding because the evidence so shows.

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP (Contracts) (Mills); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery

and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact, and which may be found in the proposed Findings of Fact set out on pages 13 to 29 inclusive of the defendants' findings submitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein.

VIII.

As a Further Grounds for this Motion for New Trial, the Defendants Move the Reconsideration and Adoption by the Court of the Conclusions of Law and the Authorities in Support Set Forth on Pages 30 to 43 Inclusive of the Defendants' Proposed Conclusions Dated 10/4/39.

IX.

In Reference to the Interference of the Nebraska Act with the National Copyright Law, and Therefore Unconstitutional, the Defendants move for the correction and additions to the Findings of Fact, conclusions of law, and decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use

by the individual. Defendants contend that a monopolistic organization such as ASCAP has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition), received \$50,000 for one of her father's rights for dramatico musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2¢ per each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2¢ per roll must be collected and fixed by the composer by the National law.

4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions, including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with

that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher. That is immaterial to this case, ASCAP not being interested therein, and that transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights". That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence. Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or 2 (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any one or all of the rights above granted,—and so far as public performance

rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance,—is that the objection? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented.

7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some \$6,000,000 per year, and in the State of Nebraska to \$70,000 per year or more.

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance.

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish,—and if they wish,—then and only then to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett, she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and determined ahead of time. The Nebraska

Act would not stop that. She received \$50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2¢ per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2¢ per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold,—if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received \$10,000 directly from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 \$7500 for those rights. If she wished to charge \$5.00, or \$10.00, or \$1.00 per copy for those sold in Nebraska for that purpose, she could so do; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.

10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A).

X.

In Reference to Additional Testimony Under Rule 59 and 52, to Bring Out All Phases of the Various Public Performance Rights, Defendants Move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 and in its finding of 1/25/40, erroneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39, and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40, are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.

3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

XI.

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly.

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its con-

stitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation.

XII.

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39, and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" references in the Findings (Par. 12, Page 7, Findings of 1/25/40) should be stricken.

XIII.

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading of the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L. B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases.

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section

2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court. Certainly there was no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his publisher the right to collect themselves for public performance rights if they wished. If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants wish the Court to reconsider. But, even if all of Section 2, including 2 (A), is classified as non-enforceable with 2 (B) and 2 (D), defendants submit that the Act, L. B. 478, shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted,

WILLIAM J. HOTZ,
of Omaha, Nebraska;

JOHN RIDDELL,

*Assistant to Attorney General Walter
R. Johnson of the State of Nebraska,
Lincoln, Nebraska;*

ANDREW BENNETT,
*for Defendant Grosshaus,
of Washington, D. C.; and*

GORDON DIEBING,
*of Omaha, Nebraska,
Assisting William J. Hotz on Brief,
Attorneys for Defendants.*

(S.) WILLIAM J. HOTZ,
*1530-5 City National Bank Building,
Omaha, Nebraska,
For Defendants.*

February 5, 1940.

Affidavit in Support of Defendants' Motion for New Trial.**Equity No. 562.****GENE BUCK, for ASCAP, et al., *Complainants,******vs.*****HARRY R. SWANSON, as Secretary of State of Nebraska,
et al., *Defendants.*****STATE OF NEBRASKA,
County of Douglas, ss:**

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted for the final passage of L. B. 478; that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25¢ per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorpo-

rated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held non-enforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be granted to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 30th day of January, 1940.

HAROLD A. MOORE,
Notary Public.

[SEAL.]

My commission expires January 28, 1943.

(Copy). Ex. 19. Exh. 1 to 22 exact copies hereof.

Certificate.

I, Grace A. Bowen, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to the Motion for New

Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(S.)

GRACE A. BOWEN,
Notary Public.

[SEAL.]

Dated: February 3, 1940.

Name	Date Signed and Acknowledged	County	Notary -
Armstrong, Robert M. Exh. 1	1/30/40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2	1/30/40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3	1/29/40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4	1/31/40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5	1/31/40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6	1/30/40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7	1/30/40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8	1/31/40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9	1/30/40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10	1/30/40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11	1/31/40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12	1/31/40	Washington, D. C.	Helen A. Bonorden
Peterson, Carl H. Exh. 13	1/29/40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14	1/30/40	Saunders, Nebr.	C. N. Walton
Regan, R. C. Exh. 15	1/30/40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16	1/30/40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17	1/31/40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18	2/1/40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19	1/30/40	Douglas, Nebr.	Harold A. Moore
Tvrlik, Charles F. Exh. 20	1/31/40	Douglas, Nebr.	Otto Smolek
Von Seggern, E. M. Exh. 21	1/31/40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22	1/31/40	Jefferson, Nebr.	E. R. Bee

Acknowledgment of Service.

The undersigned, one of the attorneys for the plaintiffs in the above entitled cause, hereby acknowledges receipt of copy of the Defendants' Motion for New Trial and the Affidavits Attached, the same being served upon the undersigned this 5th day of February, 1940.

Dated at Omaha, Nebraska, this 5th day of February, 1940.

L. J. TEPOEL,
One of the Attorneys of Record
for the Plaintiffs.

Filed in Lincoln Division, Feb. 5, 1940, Mary A. Mullen,
Clerk, by J. B. Nickerson, # 56, Deputy.

EXHIBIT "G".

No. 562 Equity.

Order.

Filed District of Nebraska, at —M #57, Mar. 28, 1940.
Mary A. Mullen, Clerk, by J. B. Nickerson, Deputy.

The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) ARCHIBALD K. GARDNER,
United States Circuit Judge;
THOMAS C. MUNGER,
United States District Judge;
J. A. DONOHOE,
United States District Judge.

EXHIBIT "H".

Legislative Bill No. 478.

Introduced by Frank J. Brady of Holt.

AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall

have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved

by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Be it Enacted by the People of the State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such

combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be

members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all

uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firm or corporations who shall file said copies from time to time; and provided further,

said Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and rebroadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or rebroadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then

such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio rebroadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B). When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of

copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use

or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1, hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in

any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than \$5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said

action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated,

the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records.

books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of \$100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.

(Act construed in *Buck v. Swanson*, 33 Fed. Supp. 377.)